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No. 03-44

In The Supreme Court of the United States

BASIM OMAR SABRI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

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OTHER AUTHORITIES

ABA Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* 56 (1998) 6,7

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (hereinafter "NACDL") submits this Brief *Amicus Curiae* brief in support of the Petitioner in this case, Basim Omar Sabri.[1] NACDL is a nonprofit corporation with more than 10,000 lawyer-members and 28,000 affiliate-members in all 50 States. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice and to ensuring that criminal statutes are in accord with the United States Constitution. In furtherance of this and its other objectives,[2] NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.

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[1] The parties have consented to the submission of this Brief *Amicus Curiae*, and their letters of consent have been filed with the Clerk of this Court. None of the parties authored this brief in whole or in part and no one other than *amicus curiae*, its members, or its counsel contributed money or services to the preparation or submission of this brief. *See* S. Ct. Rule 37.6.

[2] More information about the NACDL, its work, and its mission is available at http://www.nacdl.org.

STATEMENT OF THE CASE

The relevant facts of this case, its procedural history, and the fundamental principles of federalism and how they apply to 18 U.S.C. §666 are amply set forth in Mr. Sabri's Brief. This Brief *Amicus Curiae* will address, through the works of commentators on the subject and the caselaw, the dangerous breadth of §666(a)(2), and how it threatens the foundation of federalism.

SUMMARY OF THE ARGUMENT

This case considers the constitutional validity of a relatively novel but increasingly employed federal criminal statute, 18 U.S.C. § 666,[3] that has engendered fierce debate about some of the "oldest questions" of constitutional law. *See New York v. United States*, 505 U.S. 144, 149 (1992) ("[t]he constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States").

Indeed, the division among the courts – in this case, for example, between the District Court and the Court of Appeals, and even within the appellate panel itself – regarding a question so fundamental as Congress's authority

[3] Section 666 is sometimes characterized as "the Beast in the Federal Criminal Arsenal" or "the Stealth Statute." *See* George D. Brown, *Stealth Statute: Corruption, The Spending Power, and the Rise of Section 666*, 73 NOTRE DAME L. REV. 247 (1998); Daniel N. Rosenstein, Note, *Section 666: The Beast in the Federal Criminal Arsenal*, 39 CATH. U. L. REV. 673 (1990).

to enact particular legislation is nothing less than extraordinary.

Certainly the stakes are sufficiently important to warrant such controversy. The issue at the heart of this case is, in the words of one District Court, "how far Congress has gone, and, under the Constitution, may go, to federalize crime."[4] It is a fundamental principle of constitutional law that the federal government lacks a general police power. Therefore, there are real and enforceable limits on Congress's ability to use its Spending Power to create, prosecute, and punish federal crimes.

Section 666(a)(2) exceeds those limits, and federal prosecutors' burgeoning use of the statute in "garden-variety" local corruption cases threatens to undermine the tenets of federalism, creating federal criminal jurisdiction in matters traditionally, and constitutionally, left for the states to proscribe and punish. Neither Congress's Spending Power, nor the Necessary and Proper Clause (the "Sweeping" clause), provide authority for such a federal arrogation of law enforcement power at the expense of the states.

Left unchecked, this authority, and federal criminal jurisdiction, will eclipse state criminal law enforcement to an unwarranted degree, and, in the course of exceeding Congress' enumerated powers, also usurp those the Tenth Amendment leaves to state and local governments.

[4] *United States v. McCormack*, 31 F. Supp. 2d 176, 177 (D. Mass. 1998).

Affirmance of the decision below, which would permit the exercise of federal jurisdiction under §666 (a)(2) absent any nexus between the offense conduct and integrity of the federal program at issue, or the funds provided to state and local governments and agencies, would effectively "federalize" the entirety of criminal common law, and erase any restraints on Congress's ability to regulate criminal conduct heretofore reserved for the states.

Accordingly, in Judge Bye's words, "the law is unconstitutional, void *ab initio*." *United States v. Morgan*, 230 F.3d 1067, 1073 (8th Cir. 2000) (Bye, J., *concurring*) ("Congress may not pass laws unless it acts pursuant to an express grant of power or authority in Article I of the Constitution. Section 666 cannot properly be linked to any grant of Congressional power in the Constitution. Hence, Congress exceeded its proper authority in enacting §666").

ARGUMENT

SECTION 666(a)(2) EXCEEDS CONGRESS'S AUTHORITY, AND VIOLATES THE TENTH AMENDMENT

Section 666 has developed into an increasingly deployed weapon in federal prosecutors' anti-corruption arsenal.[5] As Professor Brown reports, in a just-published

[5] By 1990, there were only nine published opinions discussing the provision. Since then, use of the statute has increased dramatically. *See* Rosenstein, *The Beast in the Federal Arsenal*, *supra*, at 690 & n. 152.

study:

> [p]rosecuting state and local corruption is an important activity of the Department of Justice. Between 1981 and 2000, 1,704 state officials were indicted on corruption offenses, 1,462 were convicted, and 554 were awaiting trial at the end of 2000. The twenty-year totals for local officials were as follows: 4,968 were indicted, 4,233 were convicted, and 1,735 were awaiting trial as of the end of the year.[6]

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Commenting particularly on §666, Professor Brown notes that "[t]his surprisingly little-known statute is on the way to becoming a favorite tool of federal prosecutors dealing with state and local corruption."[7] Thus, the Question Presented in this case, and the constitutional arguments it involves, are all the more significant in light of the dangers that the federalization of crime poses to the administration of federal criminal justice and to "first principles" of constitutional federalism.[8]

[6] George D. Brown, *New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?*, 60 WASH. & LEE L. REV. 417, 421 (2003).

[7] *Id.* at 504.

[8] *See generally* Chief Justice William H. Rehnquist, *Report to Congress* (Jan. 1, 1999) (noting that the over-federalization of crime "threatens to change entirely the nature of our federal

In that context, the American Bar Association has called for a "principled recognition by Congress of the long-range damage to real crime control and to the nation's structure caused by inappropriate federalization." ABA Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law*, at 56 (1998). The ABA Task Force included among the "detrimental long-term effects of unwarranted federal intrusions[,]" the position that such federalization "generally undermines the state-federal

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system"). Indeed, even a brief survey of the reported cases involving §666 prosecutions reveals that the statute threatens the federal-state balance that is particularly important in the criminal law context, and has often reached "garden-variety" local corruption where there is no meaningful connection to a federal interest. *See, e.g., United States v. Grossi*, 143 F.3d 348 (7th Cir. 1998) (town supervisor demanded and received bribes for, *e.g.*, administering local general-assistance program funds to compensate doctors for unpaid bills); *United States v. DeLaurentis*, 230 F.3d 659 (3rd Cir. 2000) (supervisor of police detectives, in return for bribes, interceded with town council to keep a bar open, thereby necessitating disproportionate allocation of police manpower to the detriment of street patrols elsewhere); *United States v. Little*, 889 F.2d 1367 (5th Cir. 1989) (contractor sold pipe to counties and gave kickbacks to county officials who granted contracts); *United States v. Coyne*, 4 F.3d 100 (2nd Cir. 1993) (county executive received bribes in connection with civic-center project and automobile purchases); *United States v. Lipscomb*, 299 F.3d 303 (5th Cir. 2002) (city council member accepted bribes from taxicab company owner); *United States v. Ferrara* 990 F.Supp. 146 (E.D.N.Y. 1998) (defendant charged with bribing town board in exchange for change in zoning to allow construction of radio tower); *United States v. Smith*, 659 F.Supp. 833 (S.D.Miss. 1987) (county supervisor charged with accepting bribes in connection with purchase of culverts and grader blades).

fabric and disrupts the important constitutional balance of federal and state systems[.]" *Id.*, at 50.

In addition, the ABA Task Force reported a negative impact on the federal courts as well: "[n]early all of those who have examined the impact of federalization have concluded that the federal courts are being overburdened with cases traditionally handled in state courts." *Id.*, at 38. Nor did it matter whether federal enforcement was sporadic, since the Task Force concluded that "inappropriately federalized crime causes serious problems to the administration of justice in this country. Even when prosecuted only occasionally, inappropriately federalized crimes threaten fundamental allocations of responsibility between state and federal authorities." *Id.*, at 50.

As the court below observed, "it is axiomatic that '[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.' *United States v. Morrison,* 529 U.S. 598, 607 (2000)." *United States v. Sabri,* 326 F.3d 937 (8th Cir. 2003). Accordingly, courts and commentators have frequently observed that the constitutional authorization for §666 is Congress's "Spending Power" – *i.e.*, its power to "provide for the . . . general Welfare of the United States."[9]

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[9] U.S. CONST. art. I, § 8, cl. 1. *See, e.g., Fischer,* 529 U.S. at 689 n.3 ("Section 666 was adopted pursuant to Congress' Spending Power, Art. I, § 8, cl. 1.") (Thomas, J., dissenting); *United States v. Phillips*, 219 F.3d 404, 414 (5th Cir. 2000) ("Congress' authority to enact Section 666 rests on the Spending Clause of the Constitution."); *United States v. Morgan*, 230 F.3d 1067, 1073 (8th

However, it is not at all clear, how, whether, and to what extent the Spending Power authorizes the creation, prosecution, and punishment of federal crimes. As Professor Engdahl has (colorfully) put it:

> [f]unds recipients are not protectorates of the federal government[.] . . . The Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog. Money cannot infect the recipient with the germ of generalized federal governing control, or an infectious virus capable of spreading that disease to anyone who touches the recipient or its property.[10]

This Court has not yet had occasion to consider the applicability of *South Dakota v. Dole*, 483 U.S. 203 (1987), and its conditional-spending progeny to a challenge to the constitutional validity of a federal criminal statute. It would

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Cir. 2000) (Bye, J., concurring) ("Every court that has addressed the issue has concluded that Congress adopted Section 666 pursuant to its Spending Clause power."); *United States v. McCormack*, 31 F. Supp. 2d 176, 186 n.18 (D. Mass. 1998) ("Courts have held that section 666 was passed pursuant to Congress' tax and spending power as set forth in Article I, Section 8."); Brown, *Stealth Statute, supra*, at 262; David E. Engdahl, *The Spending Power*, 44 DUKE L. J. 1, 92 (1994) (asserting that §666 and similar provisions "lack any basis in the Constitution" and that "Congress has no more power to punish theft from the beneficiaries of its largesse than it has to punish theft from anyone else").

[10] Engdahl, *The Spending Power*, 44 DUKE L.J. at 92.

seem, though – given "first principles" of federalism and the restrictions on conditional spending set out in *Dole*, 483 U.S. at 206-208 – that, as the Court below recognized, §666(a)(2) cannot be justified under the conditional-spending doctrine.

The Spending Clause "confers only a power to spend; it confers no independent power to regulate." Tribe, *American Constitutional Law*, § 5-10, p. 322 (2d ed. 1988) [*citing United States v. Butler*, 297 U.S. 1, 62-78 (1936)]; *see also Linder v. United States*, 268 U.S. 5, 17-18 (1925). Bribery offense involving local officials and local agencies, and local subject matters, is a matter of basic criminal law enforcement under a general police power, an area in which, as this Court pointed out in *United States v. Lopez*, 514 U.S. 549, 561 n. 3 (1995), "the States possess primary authority."

Congress is no doubt constitutionally permitted to protect federal funds it provides to local communities by authorizing federal prosecution for misappropriations of those funds. Congress, however, is not free to authorize the government to prosecute local criminal conduct that does not implicate any federal interest or the funds provided, as §666 permits the government to do here. *Federal Communications Comm'n v. League of Women Voters*, 468 U.S. 364, 399-401 (1984) (while spending power permits Congress to restrict local entity's use of federal grant monies, Congress may not regulate activities undertaken with the organization's own funds).

Because §666 does not merely impose conditions on the receipt of federal funding, *South Dakota v. Dole* fails to

provide authority for the exercise of federal criminal jurisdiction in this case. Unlike the statute in *Dole*, which withheld a portion of federal highway funds from states refusing to raise their minimum drinking age to 21, §666 does not operate directly against the federally funded entity, but on any person whose actions affect such an entity.

The statute upheld in *Dole* would have more closely resembled §666 had it authorized federal prosecution of drunk teenagers caught speeding on a back country road on the theory that they are also likely to travel on a highway constructed with federal funds during some point in their travels. It is respectfully submitted that in light of this Court's continuing sensitivity to federal encroachment on state law enforcement prerogatives, such an exercise of Congressional power under the Spending Clause would not be endorsed by this Court.[11]

Even when a federal statute only imposes conditions on a grant of federal funding, the condition "must . . . bear some relationship to the purpose of the federal spending. . . ; otherwise . . . the spending power could render academic the Constitution's other grants and limits of federal

[11] If §666 imposes a "condition" on federal funding, it is coercive, unlike the condition imposed in *Dole*. Under §666, to avoid the scrutiny of its financial affairs by federal prosecutors, a local entity would have to forego all but $10,000 per year in federal funding, as opposed to the "5% of the funds otherwise obtainable under specified highway grant programs" South Dakota would have been required to give up in order to keep its drinking age at 19. 483 U.S. at 211.

authority." *New York v. United States*, 505 U.S. at 167.[12]

When Congress seeks to impose criminal liability, and not merely impose conditions, the Constitution undoubtedly requires that the relationship between the activity Congress seeks to regulate and the purpose of the particular federal expenditure relied on to justify the regulation be more direct.

This Court's opinion in *Salinas v. United States*, 522 U.S. 52 (1997), is perfectly consistent with this view. In *Salinas*, this Court found that the prosecution of a local sheriff, whose facility housed federal prisoners under a government contract, for accepting bribes from a federal prisoner to allow conjugal visits was a proper exercise of federal power because the defendant's preferential treatment "was a threat to the integrity and proper operation of the federal program." 522 U.S. at 61.

Thus, *Salinas* found a connection between the regulated activity (a local sheriff's receipt of bribe from a federal prisoner in his custody pursuant to a federal contract) and the purpose of the expenditure of federal funds which created federal jurisdiction (housing federal prisoners).

[12] *See also Dole*, 483 U.S. at 208 (upholding minimum drinking age legislation where "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended – safe interstate travel"); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958) (condition on federal funding must be "relevant to federal interest in the [federally funded] project").

In the absence of such a link, the spending power would render the rest of Article I superfluous. *New York v. United States*, 505 U.S. at 167. Since virtually any local crime will have some effect on a federally funded entity (for example, all fifty states receive federal money for ubiquitous purposes like highways, law enforcement, and health care), permitting federal prosecutions of conduct unconnected to the federal benefits or the federally funded program would "bid fair to convert congressional authority under the [Spending] Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

That observation appears to signal that this Court does not intend to take any further "steps down that road." *Id.*. *See also* Brown, *Should Federalism Shield Corruption? – Mail Fraud, State Law and Post-Lopez Analysis*, 82 CORNELL L. REV. 225, 268, 271 (predicting the Court's continuing vindication of state and local prerogatives under principles of federalism).

In that context, the leading academic authority on §666 has expressed serious concerns about the statute's impact on federalism, cautioning that "[t]aken to its limits, the combination of the spending power with the Necessary and Proper Clause could exceed" constitutional limits.[13]

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[13] Brown, *New Federalism's Unanswered Question*, *supra*, at 510. Another commentator, one of the authors of this Brief *Amicus Curiae*, advances in a recent law review article the argument that the Necessary and Proper Clause does not provide a sufficient constitutional basis for §666. *See* Richard W. Garnett, *Federal Criminal Law, the Spending Power, and the New Federalism*, 89

Other commentators have also questioned such a basis for federal regulatory authority, noting that it would be "strange if a 'proper' executory law – a law that is distinctively and peculiarly within the jurisdiction of the national government – could regulate subjects outside the careful, precise enumeration of regulable subjects found elsewhere in the Constitution."[14]

CORNELL L. REV. 1 (2003).

It should also be noted that there is a rich, provocative, and growing literature devoted to the Necessary and Proper Clause, and that several leading scholars have contended that the Necessary and Proper Clause, correctly understood, imposes more demanding obligations on federal legislators than is sometimes supposed. *See, e.g.*, Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997); Randy E. Barnett, *The Original Meaning of the Necessary & Proper Clause*, 6 U. PA. J. CONST. L. _____ (forthcoming 2003); J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581 (2002); David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107 (1998); Gary Lawson and Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L. J. 267 (1993). James Madison famously reminded us that "[w]hatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress." 2 ANNALS OF CONG. 1898 (1791).

[14] Lawson & Granger, *Jurisdictional Interpretation*, *supra*, at 331; *see also, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1234 (1994) ("[T]he Necessary and Proper Clause, which the founding generation called the Sweeping Clause, [does not] grant general legislative powers to the national government.").

As former Chief Judge Richard S. Arnold has observed, "[o]ur Constitution is a charter for a federal government of limited powers, and under this charter the States possess primary authority for defining and enforcing the criminal law." *United States v. Delpit*, 94 F.3d 1134, 1149 (8th Cir. 1996) (internal quotation marks and citation omitted).

In the same spirit, this Court has in recent years, in *Morrison* and *Lopez*, identified and enforced constitutional limits on Congress' power to expand federal regulatory power and jurisdiction. *Cf. McNally v. United States*, 483 U.S. 350, 360 (1987) (refusing to construe the then-existing mail fraud statute, 18 U.S.C. §1341, "in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials").

It is respectfully submitted that such vigilance is necessary and appropriate with respect to §666(a)(2) as well. While Article I of the Constitution grants Congress an expansive, sweeping power to promote the "general Welfare of the United States," the Constitution also imposes on that authority meaningful limits that protect individual liberty in criminal cases by constraining government no less than do the Fourth, Fifth, and Sixth Amendments.

Those prosecuted under §666 are not Congress's contracting partners for purposes of conditional-spending doctrine; nor are §666 prosecutions of corrupt individuals by the United States obligations to which the recipients of

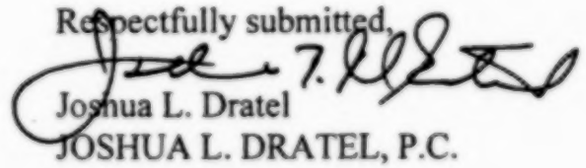
federal-program funds could possibly be said to have agreed. The Sweeping Clause's occasional role as a constitutional catch-all cannot, consistent with "first principles" of constitutional law, sustain the argument that the effectively unlimited scope of §666(a)(2) is valid as "necessary and proper" to the smooth functioning of federal programs aimed at promoting the General Welfare.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that 18 U.S.C. §666(a)(2), in reaching conduct lacking a nexus to a federal interest exceeds Congress's authority, and violates the Tenth Amendment. As a result, §666(a)(2) is unconstitutional on its face, and the judgment below in this case should be reversed.

Dated: 26 November 2003
New York, New York

Respectfully submitted,



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